No. 83-1968

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

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LACY H. THORNBURG, *et al.*,
*Appellants,*

v.

RALPH GINGLES, *et al.*,
*Appellees.*

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**On Appeal from the United States District Court for the Eastern District of North Carolina**

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## BRIEF OF AMICUS CURIAE THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF APPELLANTS

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## QUESTIONS PRESENTED

1. Whether the Voting Rights Act requires states to devise election districts and procedures which, wherever the concentration of minority voters is sufficiently large, will enable minorities to dictate election outcomes if they adhere to minority bloc voting.

2. Whether the district court in this case relied excessively on a Senate Judiciary Committee Report's pronouncements as to the meaning of Section 2 of the Voting Rights Act, to the exclusion of the language of the statute itself.

3. Whether the failure of non-minority citizens to vote in sufficient numbers for minority candidates in a given jurisdiction may constitute grounds for holding that jurisdiction in violation of Section 2 of the Voting Rights Act.

4. Whether the district court erred in holding that there is a degree of polarized voting sufficient to sustain a violation of the Act whenever the results of a district's elections would differ depending upon the race of the voters whose votes were counted.

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### INTERESTS OF AMICUS CURIAE

The Washington Legal Foundation (WLF or Foundation) is a national nonprofit public interest law center that engages in litigation and the administrative process in matters affecting the broad public interest. WLF has more than 80,000 members located throughout the United States, including in the State of North Carolina, whose interests the Foundation represents.

This brief is filed with the written consent of all parties.

WLF focuses its litigation efforts on cases of nationwide significance affecting the liberties and values of its members. The Foundation has been especially active in cases challenging misguided and overbroad applications of federal civil rights laws. For example, WLF has filed *amicus* briefs with this Court in such cases as *Memphis Firefighters v. Stotts*, 104 S.Ct. 2576 (1984); *General Building Contractors Association, Inc. v. Pennsylvania*, 102 S.Ct. 3141 (1982); and *United Steelworkers v. Weber*, 444 U.S. 193 (1979). In these cases, WLF has consistently pressed the view that the civil rights laws provide legal protection for *all* Americans and cannot be invoked to justify reverse discrimination or exacting reparations from any class of citizens.

In this case, WLF seeks to protect the interests of its members against a fundamental distortion of the federal Voting Rights Act. The decision on appeal here—and numerous other federal decisions of similar thrust—purports to guarantee preferred minority groups the right to demand "safe" election districts allowing them to dictate election outcomes through racial bloc voting for minority candidates. In so holding, the district court would mandate a form of proportional representation by race which Congress expressly rejected in the 1982 VRA Amendments.

Even more disturbingly, the decision elevates the commonplace phenomenon of "polarized voting" to a pivotal role in determining whether state redistricting plans violate Section 2 of the VRA. After defining that concept in terms broad enough to apply virtually everywhere, the district court held that the persistence of polarized voting may condemn a state or locality to perpetual noncompliance with the VRA.

The court's interpretation of Section 2 in this case thus entails an ominous threat to the voting autonomy of nonminorities in countless jurisdictions; unless they



eliminate polarized voting (i.e., the common situation where whites tend to vote differently than blacks in relation to a candidate's race or his position on racial issues) by voting compliantly for any minority candidate who appears on the ballot, their local election systems can be invalidated and enjoined by federal courts.

WLF's brief will uniquely focus on the foregoing concerns. In the briefs filed prior to the noting of probable jurisdiction, neither the North Carolina appellants nor the United States as *amicus curiae* challenged the very validity of polarized voting as an indicator of Section 2 violations. This brief does so. Thus, WLF will present significant arguments which no existing party to this case is likely to press.

## STATEMENT OF THE CASE

In the interests of brevity, the amicus curiae adopts the statement of the case set forth in the brief of the North Carolina appellants.

## SUMMARY OF ARGUMENT

1. The district court misapplied Section 2 of the Voting Rights Act ("VRA") in striking down the North Carolina redistricting plans. The court inexplicably disregarded the convincing and dispositive proof that blacks in all the challenged districts had achieved effective access to the political process through demonstrated success at the polls by black candidates. It erroneously assumed that the VRA requires that, whenever the state's minority population pool is large enough, some election districts must be fashioned so that minority voting blocs will always be able to dictate election results and assure the election of minority candidates. The court further erred in resting its decision upon the one-sided views of a non-controlling portion of the legislative history of the 1982 VRA amendments, rather than upon the language of the statute itself.

2. The court's decision was based upon its erroneous view that the persistence of racially polarized voting outweighs such positive evidence as proven black access to key elected posts in determining whether there is a Section 2 violation. In ruling that a district must eliminate polarized voting to be sure of compliance with the VRA, the court unconstitutionally penalizes a local government simply because its citizens refuse to conform their voting behavior to the ideological predilections of a federal court. Further, even if polarized voting were a valid litmus test for VRA compliance, the court applied a grossly over-inclusive definition of the concept which goes much farther than the Act's standards of equal access and equal opportunity require. The district court's interpretation and application of the polarized voting factor is ultimately incompatible with the constitutional right of all citizens to vote as they please, for any reason.

## ARGUMENT

### Preliminary Statement

This case involves a fundamental and dangerous distortion of the principles which originally motivated the Voting Rights Act of 1965, 42 U.S.C. Sec. 1973 (hereafter referred to as "VRA" or the "Act").

The purpose of the VRA was to guarantee to all Americans, regardless of race, the right, the opportunity, and the freedom to vote for the candidates of their choice.

Notwithstanding the laments of those who thrive by cultivating grievances, the VRA has succeeded. Black voter registration and black voting have grown enormously since 1965, and in an increasing number of jurisdictions the percentage of blacks registered to vote and turning out to vote now *exceeds* that of whites.[1] Pol!

[1] *See, e.g., Collins v. City of Norfolk*, 605 F.Supp. 377, 385 (E.D.Va. 1984) (showing significantly higher rates of voter registration and turnout among blacks than among whites in Norfolk, Virginia.) In the 1982 Congressional elections, blacks turned out to vote at a higher rate than whites in nine states. *See* National Journal, *Election '84 Handbook*, p. 2203 (Oct. 29, 1983).



taxes, literacy tests, and other obstacles to black political participation and voting have all been dismantled. Blacks are running for and capturing elective offices in unprecedented numbers throughout the Nation—including in the Deep South.

But some litigious elements are not content with equal access to the political process and equal opportunity to vote for the candidate of one's choice. Encouraged and fomented by sweeping court interpretations of the 1982 amendments to the VRA, the appellees and others are now claiming a "right" that was never contemplated by Congress in passing that legislation: the mandatory formation of "safe" minority election districts wherever a minority population base is large enough to allow for such districts to be devised.

The decision on appeal here adopts that same distorted approach to the curiously evolving judicial concept of "voting rights". It holds that election districts must be endlessly shaped and reshaped until they at last produce a sufficiently commanding majority of "minority" voters. Moreover, it places dispositive significance on the misleading and misunderstood concept of "polarized voting" in deciding whether a jurisdiction is in violation of the VRA. Under the district court's view, only those jurisdictions where a majority of white voters consistently vote for black candidates (whatever their views or qualifications) can avoid the stigma of "polarized voting" and a judicial determination of non-compliance with the VRA.

Neither the VRA nor its 1982 amendments authorized the courts to dictate the fashioning of "safe" districts for minorities, or to condemn jurisdictions for violating the

VRA merely because the majority of white voters in those jurisdictions have not generally voted for black candidates. Yet that is *exactly* how the court below has applied the VRA to the North Carolina communities at issue in this case.

This Court should emphatically reverse the district court's decision and thereby prevent the VRA from being used to perpetuate racial division at the polls for years to come.

## I. THE DISTRICT COURT ERRED IN INTERPRETING THE VOTING RIGHTS ACT AS THOUGH IT GUARANTEES MINORITIES "SAFE" DISTRICTS ENABLING THEM TO CONTROL ELECTION OUTCOMES BY RACIAL BLOC VOTING

### A. The Court Improperly Discounted a Proven Record of Minority Political Access and Election Success

In holding that the North Carolina redistricting plans violated Section 2 of the Voting Rights Act ("VRA"), the district court completely lost sight of that legislation's proper objective.

The VRA does not compel the creation of electoral districts or systems which will allow minority bloc voting to dictate the outcome of elections wherever there are sufficient raw numbers of minorities from which to fashion such districts. Rather, the Act requires only that electoral districts must not be designed to prevent minorities from enjoying *equal access* to the political process and an *equal opportunity* to elect representatives of their choice. 42 U.S.C. Sec. 1973(b).

Under that legitimate standard, the challenged North Carolina districts easily pass muster. The record contains comprehensive evidence proving that minority voting has had a telling effect on the political power structure and that black candidates have enjoyed substantial success in key election races. J.S. App. 34a-37a; 47a.



But the District Court did not apply the "equal opportunity" standard as set forth in the statute. Instead, it applied a standard that can only be satisfied if the redistricting plan essentially *guarantees* that minority candidates will be elected in proportion to the minority share of the population. Yet Congress explicitly rejected such a standard in amending Section 2, 42 U.S.C. Sec. 1973(b). And the courts have since made it clear that "*no group* is entitled . . . to have its political clout maximized." *Seamon v. Upham*, 536 F.Supp. 931, 945 (E.D. Tex. 1982), *aff'd sub nom Strake v. Seamon*, 105 S.Ct. 63 (1984) [emphasis added].

Various decisions have recognized that there can be no cognizable violation of Section 2 in a district where minorities have achieved substantial success in gaining access to key elective offices and political posts. *E.g.*, *Dove v. Moore*, 539 F.2d 1152 (8th Cir. 1979). A finding of consistently adverse electoral results for minority candidates is a necessary, though not a sufficient, element of a Section 2 claim under the results test. See *Seamon v. Upham*, *supra*; *Terrazas v. Clements*, 581 F.Supp. 1329 (D.Tex. 1984).

Here the districts in question are all characterized by records of proven minority access to influential elective posts. The election of black representatives to these positions demonstrates that—contrary to the district court's ruling—a "safe" black district in terms of raw population alignments is simply *not necessary* for blacks to participate effectively in the political process or to elect representatives of their choice, *Terrazas v. Clements*, *supra*, 581 F.Supp. at 1354.

In Durham County, for instance, one of the county's three representatives to the House has always been black since 1973—even though less than 29% of Durham County's registered voters are black. J.S. App. 35a. Black representation has also been substantial, and often in *excess* of what proportional representation would

produce, on the County Commission, the County Board of Elections, and the County Democratic Party leadership. This degree of proven minority access to key political offices is in itself incompatible with a claim of unlawful vote dilution. *Dove v. Moore*, 539 F.2d at 1153-55.

The same healthy degree of access to the political process is established beyond question in the other districts here in issue. The City of Charlotte has a black mayor, even though the city population is only 31% black. *Id.* at 35a. In Forsythe County, two out of five (40%) members of the House delegation are black, even though only 22% of the county voting age population is black. *Id.* In Wake County, where only 20% of the voting age population is black, a black candidate received the highest vote total in a 15-man Democratic primary for the District House seats and was subsequently elected to the county's six-member House delegation. And two out of the eight (25%) elected District Judges in Wake County are black.

These facts are simply incompatible with the elements of a Section 2 violation under the VRA Amendments of 1982. Under the plain language of the statute, a violation can only be established by proof that:

1. The political processes leading to nomination or election are not equally open to participation by members of the complaining minority, *in that*

2. its members have less *opportunity* than other members of the electorate to participate in the political process and to elect representatives of their choice, *provided that*

3. there is no right to have members of a minority elected in numbers equal to their proportion in the population.

The foregoing facts confirm that blacks do enjoy full and fair access to the political processes in the challenged



districts and that they have enjoyed at least equal opportunity to elect representatives of their choice. Were this not so, it is simply implausible that the Forsythe County House delegation would be 40% black (nearly double what proportional representation would produce); that the Durham County House delegation would have been one-third black since 1973; or that the City of Charlotte would have a black mayor.

The court below, however, was wholly indifferent to this evidence of extensive black access, participation, and success in the political processes of the districts in issue. It was less concerned with the hard fact that blacks were winning major elections at all levels than it was with lamenting upon the historical consequences of "past discriminatory" practices or the abstract implications of so-called "polarized voting". And it was so preoccupied with the misbegotten notion that racial bloc voting by minorities[2] must be allowed to control election outcomes that it failed to recognize that blacks were *already* enjoying full and fair participation in the election processes without the divisive racial gerrymandering demanded by this decision.

### B. The District Court Erroneously Applied the Act as though It Guarantees Minorities a Minimum Share of Political Power, as Opposed to Equal Opportunity

The District Court set an erroneous course from the outset of its decision, when it stated as follows (J.S. App. at 14a):

> The essence of racial vote dilution in the *White v. Regester* sense is this: that primarily because of the

[2] It is highly revealing that the district court's approach to voting rights is premised on the view that bloc voting by racial minorities is to be expected and accommodated (i.e., by gerrymandering districts to allow such bloc voting to control elections), while bloc voting by racial majorities is considered so pernicious that it alone may give rise to a violation of the VRA. J.S. App. 14a-15a, 41a, and 47a.

> interaction of substantial and persistent racial polarization in voting patterns (racial bloc voting) with a challenged electoral mechanism, a racial minority with distinctive group interests that are capable of aid or amelioration by government is effectively denied *the political power* to further those interests *that numbers alone would presumptively give it* in a voting constituency not racially polarized in its voting behavior. [citation omitted; emphasis added].

This statement bears careful scrutiny, for it states the critical premise for the court's ultimate decision. It is a statement that the VRA guarantees minorities the right to electoral mechanisms which will invariably maximize the impact of minority bloc voting, while it effectively condemns non-minority voters for failing to embrace minority candidates (i.e., "persistent polarization"). This is a false and unconstitutional interpretation of the VRA.

Initially, the court's statement glibly asserts that the pivotal decision in *White v. Regester*, 412 U.S. 755 (1973), had emphasized racially polarized voting as a key element of unlawful racial vote dilution. But this critical point is completely false.

The true holding of *White* is highly important to current Section 2 analysis, because the single point on which most Congressional elements agreed in passing the 1982 amendments was that they were intended to codify the principles of decision in *White v. Regester*. Yet one will search in vain for *any* mention (much less any significant mention) of polarized or racial bloc voting in *White v. Regester's* discussion of the various elements of a vote dilution claim under the VRA. *See* 412 U.S. at 766-67. In fact, the source of the district court's heavy reliance on the polarized voting factor was not *White v. Regester* at all, but rather the inaccurate portrayal of *White v. Regester* set forth in a controversial segment of the legislative history of the Act's 1982 amendments (see Point I.D., *infra*).



More importantly, the district court interpreted Section 2 as though it compels states to devise electoral mechanisms which will guarantee the election of minority candidates by facilitating minority bloc voting. That is, if it is at all possible to fashion a district with enough blacks to always guarantee the election of the "black" candidate by their "raw numbers alone", then the court below would compel the state to do so.

That view of the VRA is invalid and unsound. As recently stated by the court in *Terrazas v. Clements*, *supra*, 581 F.Supp. at 1359-60:

> In the absence of a denial of access, or discriminatory intent, the failure to consolidate the [minority] population may constitute a less advantageous political result, *but not an unlawful result.* [emphasis added].

The court below invalidated the North Carolina redistricting plans merely because they failed to provide a perfect arrangement for preemptive racial voting by minorities. That was reversible error, because the VRA simply does not require the states to "maximize the political clout" of *any* racial, religious, or ethnic group. *Seamon v. Upham*, *supra*, 536 F.Supp. at 945. All that the Act requires is equal *access* to the political process—and the creation of "safe" minority districts is simply not a prerequisite to equal access. *Terrazas v. Clements*, *supra*, 581 F.Supp. at 1354.

### C. The Court Applied a Clearly Erroneous Interpretation of Illegal Vote Dilution

The overinclusive concept of illegal vote dilution relied on by the district court completely distorts the principle of equal political access which underlies the Voting Rights Act. Equal opportunity for minorities to participate in the elective process does not—*cannot*—include any re-

quirement that non-minorities must subordinate or compromise their constitutional right to vote for whomever they please, and for whatever reason. *Kirksey v. City of Jackson*, 633 F.2d 659, 662 (5th Cir. 1981); *Anderson v. Martin*, 375 U.S. 399, 402 (1964).

Yet the district court tied its holding in this case to the following extraordinary interpretation of vote dilution under the VRA:

> [T]he demonstrable unwillingness of substantial numbers of the racial majority to vote for any minority race candidate or any candidate identified with minority race interests is the linchpin of vote dilution by districting. [J.S. App. 14a-15a.]

The court made its position still clearer when, after acknowledging that blacks have made substantial progress in gaining access to political power in the North Carolina districts, it emphasized that this progress

> . . . has not proceeded to the point of overcoming still entrenched racial vote polarization, and indeed has apparently done little to diminish the level of that single most powerful factor in causing racial vote dilution. [*Id.* at 47a.]

Thus, the district court repeatedly emphasized its view that the most critical component of the violations in this case—and the "single most powerful factor" in finding a vote dilution violation—was the failure (or "unwillingness") of white citizens to vote in essentially the same way as black citizens. When one reads between the lines of the foregoing pronouncements, it is evident that the court is issuing a none-too-subtle warning to North Carolina's white voters. The warning is that unless they start to vote for minority candidates (regardless of the candidate's individual merit or qualities) in "substantial numbers", the court will continue to hold that there is "racial vote dilution" in their districts. And as long as the court holds that view, it will continue to invalidate and enjoin the district's elections.



This constitutes a profound distortion of the true goals and principles of the Voting Rights Act. The district court blithely dismissed hard evidence that blacks *do* enjoy equal access to the political/elective processes (e.g., 40% representation on House delegation of district composed of only 22% black voters) and focused instead on the allegedly culpable behavior of white voters in failing to alter their voting preferences in favor of minority candidates.

This crabbed and punitive approach to voting rights law abandons the basic element that Section 2 of the VRA can only be violated by the discriminatory practices and policies of *governments;* Section 2 cannot be violated by citizens in the exercise of their absolute First Amendment right to vote for the candidate they prefer, for whatever reason. *Kirksey, supra*, 663 F.2d at 662.[3] The district court's opinion erred in failing to grasp this distinction.

### D. The District Court Erred in Interpreting the Controversial Senate Judiciary Committee Report as Though It Were the Statute

The district court was able to reach its erroneous conclusions only by misinterpreting Section 2 of the Act. Its misinterpretation was hardly surprising, however, because the court never even *attempted* to interpret the actual language of the statute itself. Instead, it relied almost exclusively upon selected portions of a Senate Com-

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[3] The VRA itself, 42 U.S.C. Sec. 1971(b), prohibits any form of intimidation or coercion intended to interfere with any person's right "to vote *as he may choose.*" [emphasis added] But the court's admonition that the racial majority's "entrenched" failure to vote for minority candidates may result in a violation of Section 2 is itself a form of coercion or intimidation intended to alter white voting behavior. It is not farfetched to argue that the court's ominous warnings could themselves violate the VRA's prohibition of intimidation or coercion, were it not for judicial immunity.

mittee Report.[4] That report reflected the views of only a modest majority of the Senate Judiciary Committee, whereas the enacted statute reflected a complex compromise between a wide variety of factions in the full Senate and the full House, as well as the views of the President.

The district court's slavish adherence to the one-sided observations of the Senate Committee Report is totally unjustifiable under black letter rules of statutory interpretation—but it is understandable in one significant respect.

Only by treating the Committee Report as though it were the definitive authority on amended Section 2 could the court possibly justify its rigid application of the Report's so-called "nine factors" test (including "polarized" voting) as the definitive standard for determining violations of Section 2. See S.Rep. at 28-29. And only by placing such exaggerated reliance on the Committee Report's "nine factors" could the court find a violation in the North Carolina districts at issue. For the actual statutory language of Section 2 nowhere mentions such open-ended factors as "polarized voting", minority employment conditions, or political "responsiveness"—*and the 1982 amendments would never have passed the full Senate or been signed by the President had such controversial and divisive factors been explicitly incorporated in the statute.*

The ultimate language of the 1982 amendments to Section 2 was indeed a compromise of conflicting viewpoints. But the Senate Judiciary Committee Report does not even begin to reflect the diverse elements of that multi-partite

[4] S.Rep. No. 97-417, *Report of the Senate Judiciary Committee on S. 1992*, 97th Cong., 2d Sess., ordered to be printed May 25, 1982 (hereafter cited as "S.Rep."). Senators Thurmond, Hatch, Laxalt, Dole, Grassley East, and Denton all found it necessary to append "additional", "supplemental", or dissenting views to the Committee Report.



compromise. Instead, it reflects only the one-sided aspirations of a faction of Judiciary Committee Senators who favored the most expansive interpretation of Section 2 they could promulgate without killing the legislation altogether.

The earlier House-passed bill (H.R. 3112), which was subsequently introduced verbatim in the Senate by Kennedy and Mathias, had raised serious concerns that it might ultimately require proportional representation of minorities among elected officials. To eliminate these concerns, Senator Dole introduced the proviso which explicitly disclaims that the section creates any right to proportional representation.

At the Senate mark-up of the bill, Senator Dole articulated the essence of the compromise which finally resulted (S. Rep. at 223):

> [T]hat is the thrust of our compromise: equal access, whether it is open; equal access to the political process, not whether they have achieved proportional election results.

Only when President Reagan signaled that the Dole substitute was acceptable to him (i.e., that he would not veto the bill if passed) did the divergent forces and factions in the House and Senate come together to enact the legislation. Since the House simply adopted the Senate-passed Dole substitute without change, there was no need for a Conference Committee—and there was no Conference Committee Report reflecting the understanding and intent of both Houses in passing the bill.

Moreover, there is no plausible basis for viewing the Senate Judiciary Committee Report—which was intensely disputed *even within that one committee* of one House—as though it reflected the consensus understanding and intent of both Houses, as well as that of the President. It simply did not. It reflected only the subjective views

of some eleven members of the eighteen-member Senate Judiciary Committee.[5]

But the court below approached the new statutory language of Section 2 as though it were a mere afterthought to the controversial Senate Judiciary Committee Report. More specifically, the court judged the North Carolina districts by the standards of the Senate Report rather than by the standards of the statute. This violates the first principles of statutory construction and, in itself, is clearly reversible error.

It goes without saying that committee reports are neither enacted by Congress nor signed by the President, and they simply do not have the force of law. *In re Evans*, 452 F.2d 1239 (D.C. Cir. 1971), *cert. denied*, 408 U.S. 930 (1971).

In *Davidson v. Gardner*, 370 F.2d 803, 828 (6th Cir. 1967), the Sixth Circuit correctly stated the extremely limited authority of the report of a single house of Congress with respect to interpreting the resultant statute:

> The House Report, in this regard, was not agreed to in the Senate Report, nor was any mention made of it in the Conference Report. *The report of a Committee of the House "does not go very far to show the intention of a majority of both houses of Congress." Porter v. Murray*, 69 F.Supp. 400, 402 (D.D.C. 1946).

As further stated by the Court in *Porter v. Murray*, 69 F.Supp. at 402, the report of a single committee of the Senate is distinctly "less persuasive on the issue of Congressional intent than the report of a conference committee of both Houses". *Accord*: K. Davis, *Administrative Law Treatise* Sec. 3A.31 (1970 Supp.) at 175 ("The basic principle is quite elementary: The content of the law must depend upon the intent of both Houses, not of just one.").

[5] It would have been a simple matter to list the "nine factors" cited by the Senate Report in the body of Section 2 itself. Why this was not done is obvious: the Senate would have never passed a bill with those highly controversial factors, and the President would never have signed it.



The same point applies here with regard to the subjective views of the group of Judiciary Committee staffers who drafted the Senate Judiciary Committee Report. The Judiciary Committee Report was simply not a consensual legislative document, and it provides a highly suspect and unreliable indicator of the intent of the whole Congress.

Confronting a similar dispute over Congressional intent and legislative history in *Hardin v. Kentucky Utility Commission*, 390 U.S. 1, 11 (1968), this Court stated:

> We think . . . that the language of the Act in its final form is a compromise and that the views of those who sought the most restrictive wording cannot control interpretation of the compromise version.

Here, in the same vein, the views of those who sought the most *expansive* wording of Section 2 likewise cannot control interpretation of the compromise legislation. Yet, there can be no doubt that the Senate Judiciary Committee Report primarily reflects the views of Senators Mathias[6] and Kennedy—the same two senators who had originally introduced a Senate Bill which was *identical* to the far more liberal House-passed bill (H.R. 3112). Since neither the House nor the President ever approved or joined in the Senate Committee Report, it is totally invalid for courts to place such critical emphasis on its content in construing the statute. *National Association of Greeting Card Publishers v. U.S. Postal Service*, 103 S.Ct. 2717, 2731 n.28 (1983).

The court's unquestioning reliance on the nine factors listed in the Committee Report has resulted in a rigid

[6] It was Senator Mathias who "filed the majority views of the Committee". S.Rep. at 1.

"factor-counting" method of judgment which completely obscures the original purposes of the Act. Since the validity of the district court's decision depends on the controlling legal force of the Committee Report's "nine factors", and since those "nine factors" are neither part of the statute nor a valid statement of its meaning, the decision below should be reversed on that basis as well.

## II. THE DISTRICT COURT ERRED IN ITS CRITICAL RELIANCE ON THE FACTOR OF "POLARIZED VOTING", WHICH IS TOTALLY INVALID AS AN INDICATOR OF VOTING RIGHTS ACT VIOLATIONS

The decision below follows a disturbing trend in voting rights cases which places all but dispositive significance on the existence of racially polarized voting. *See also United States v. Marengo County Commission*, 731 F.2d 1546, 1567 (11th Cir. 1984); *Jones v. City of Lubbock*, 727 F.2d 364, 380-81 (5th Cir. 1984). In the *Marengo County* case, for example, the court stated that

> Some authorities suggest that a finding of discriminatory result is *compelled* when plaintiffs show racially polarized voting combined with an absence of minority elected officials. [731 F.2d at 1574; emphasis added]

The district court in this case all but confirmed that the persistence of polarized voting will *always* provide grounds for finding a violation of the VRA, even where minorities have achieved considerable success in gaining important elective posts. (J.S. App. 47a). The court was explicit in holding that it views polarized voting as the "single most powerful factor" underlying violations of the VRA. *Id.*

It is painfully clear that the court's concept of polarized voting, and its application of that concept to the facts of this case, was the "linchpin" of its ruling that North Carolina had violated the Act. But this constitutes an extremely dangerous and divisive interpretation of voting rights law: it requires injurious legal consequences to be imposed unless an identified class of citizens is willing to alter their voting behavior in a manner considered desirable by some federal court.



The existence of polarized voting cannot lawfully provide grounds for holding that a state or local government has violated VRA—least of all where (as here) there would be no grounds for finding a violation but for the polarized voting. At least in the United States, the manner in which the citizens of various races or ethnic groups exercise their voting franchise, individually or as groups, is utterly beyond the lawful power of a State or political subdivision to control. Even if some citizens vote with discriminatory motives, those motives cannot be imputed to the State. *Kirksey v. City of Jackson*, *supra*, 663 F.2d at 662; *Jordan v. City of Greenwood*, 534 F.Supp. 1351, 1366 (D.Miss. 1982).

Thus, it is legally and logically insupportable to allow the validity of a State's election system to depend upon how its citizens choose to vote. Yet that is *exactly* what the district court did in this case, under the rubric of "polarized voting".

### A. Polarized Voting is a Prevalent American Voting Pattern

Given the tone of severe rebuke with which the court proclaimed that polarized voting persists in these North Carolina districts (J.S. App. 14a-15a, 47a), one would think that it constitutes some form of insidious, abnormal departure from prevailing American voting patterns. On the contrary, it would be far more accurate to recognize polarized voting for what it is: a prevailing norm in voting behavior throughout America. It therefore seems highly illogical—not to mention hypocritical—for the law to condemn a jurisdiction's election system pri-

marily because its citizens manifest the same cross-racial voting discrepancies that characterize voters nationwide.

Polarized voting means only that voters of different races, as groups, tend to vote differently from one another in relation to the race of the candidates (or in relation to the candidate's identification with minority issues). J.S. App. 38a-39a n.29; *Collins v. City of Norfolk, supra*, 605 F.Supp. at 377. In this case, the district court adopted the view that there is a "substantively significant" degree of polarization whenever "the results of the individual election would have been different depending upon whether it had been held among only the white voters or only the black voters in the election." (J.S. App. 39a-40a).

This means that whenever a majority of black voters support a black candidate at the polls there will always be a "substantively significant" degree of polarized voting unless a majority of whites vote for the black candidate as well.

The folly and inappropriateness of relying upon this view of "polarized voting" as an index of actionable voting rights discrimination is illustrated by the voting results of the 1984 Democratic Presidential primaries.

In most of those primaries, the votes were divided between Walter Mondale and Gary Hart, who are white, and Jesse Jackson, who is black. As established by data compiled for the Joint Center for Political Studies (see Appendix A),[7] the Democratic Presidential primaries in *every one* of the thirteen states surveyed were characterized by the most extreme form of racial polarization.

In most of the primaries surveyed, Jackson received *less than 5%* of the white vote but *over 75%* of the black

[7] The data are taken from Thomas E. Cavanagh and Lora S. Foster, *Election '84, Report #2, Jesse Jackson's Campaign: The Primaries and Caucuses*, Table 4 (Joint Center for Political Studies, 1985).



vote. In New Jersey, Jackson received *86%* of the black vote, but only 4% of the white vote; in New York, it was *87%* of the black vote, compared to only 6% of the white vote. In none of the surveyed primaries did Jackson received as much as 10% of the white vote, or less than 50% of the black vote.

Unless this Court is prepared to declare that the white membership of the Democratic party is composed of racists from coast to coast, then there must be something else besides anti-black racial prejudice to explain the extreme statistical polarization in the 1984 primary election voting. That "something else" may well have been Jesse Jackson's total lack of government experience; his status as a practicing clergyman; his controversial "adventures" in the field of foreign affairs; or a combination of such factors. But only the most irrational analysis could conclude that the low white vote for Jackson could accurately be attributed to white racism; there were simply too many other objective factors to explain a rejection of his Presidential candidacy.

Similar considerations negate the significance of any legal conclusions drawn from the "polarized" voting patterns found to exist in this case. Black candidates who received little support from white voters may just as well have been rejected for their stands on the issues, their liberal ideology, or their personality as for their race. See *Jones v. City of Lubbock*, 730 F.2d 233, 234 (5th Cir. 1984) (Higginbotham, J., concurring specially).

The statistical "evidence" offered by appellees on "polarized" voting therefore fails to come to grips with an inescapable fact: white voter rejection of a black candidate can be based upon a host of factors that have nothing at all to do with race.

The 1984 Democratic primary statistics prove that even the most extreme degrees of racial polarization in

voting often bear no relationship at all to the kind of discrimination targeted by the VRA. The mere fact that overwhelming majorities of blacks vote for a given black candidate (such as Jesse Jackson) provides no grounds whatsoever to question the attitudes of whites who overwhelmingly reject the same candidate. To hold otherwise affronts both common sense and the equal protection clause. Yet the courts discredit the integrity of the white vote every time they invoke "polarized voting" to justify finding a violation of the VRA.

One could give innumerable examples of how the concept of "polarized voting" is a completely misleading indicator of conditions pertinent to genuine Voting Rights Act violations. Few elections were more racially polarized than the 1984 Presidential election; white voters overwhelmingly rejected the Mondale candidacy which black voters were all but unanimous in supporting. Yet no one could responsibly argue that this sharp divergence in political attitudes along racial lines somehow taints the validity of our Presidential election system or that it unfairly dilutes the black vote.

Moreover, even urban jurisdictions where black political power is most vigorous—Chicago, Newark, Philadelphia, Atlanta, all of which have strong black mayors—have been characterized by very high levels of racial polarization in voting.[8] This again undercuts the notion that polarized voting prevents effective access to the political system.

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[8] Black candidate Harold Washington received 369,340 black ward votes but only 19,252 white ward votes in winning the Chicago mayoralty election in 1982; some 245,845 whites voted against him. National Journal, *Election '84 Handbook* 2209 (Oct. 29, 1983). The black candidates elected mayor in Newark, New Jersey, Gary, Indiana, and Cleveland, Ohio, received 96%, 93%, and 96% of the black vote, respectively, as against only 16%, 10%, and 15% of the white vote. Levy and Kramer, *The Ethnic Factor: How America's Minorities Decide Elections* (Simon & Schuster, 1972).



Polarized voting is simply a contemporary characteristic of American politics; it reflects the reality of the widely diverse political preferences which are inevitable in a multi-racial democracy. But the existence of such diversity hardly provides legitimate grounds for condemning state and local election systems.

The Act's guarantee of an equal *opportunity* for minorities to participate in the political process, 42 U.S.C. Sec. 1973(b), need not and cannot be construed to require *any* compromise of the constitutional guarantee of the freedom to vote as one pleases. More to the point, the legality of a state's election system cannot be conditioned upon a shift of white citizens' votes to black candidates which will be sufficient to satisfy the expectations of three federal judges.

### B. The Court Applied an Unreasonable Standard in Finding that a "Substantively Significant" Degree of Polarized Voting Existed

Even if polarized voting could be viewed as a relevant indicator of Section 2 violations, the district court applied an unreasonable and invalid standard in finding that it existed to a critical degree in this case. The court held that a "substantively significant" degree of polarization occurs whenever the election's outcome would be different depending on whether it was held among only black voters or only white voters (J.S. App. 39a-40a).

This gives the polarization factor a scope and weight far beyond what Congress contemplated in passing the 1982 amendments. The statute itself nowhere mentions (let alone condemns) polarized voting. Even if Congress did intend for polarization to be treated as persuasive evidence of a voting rights violation, it surely had in mind something far different than the kind of unexceptionable voting patterns examined in this case. Jurisdictions where black candidates are able to attract 50% (District No. 36), 40% (District No. 39), 37% (District

No. 23), 39% (District No. 21), and 32% (District No. 8) of the white vote—see J.S. App. 41a-46a—simply cannot be characterized as pockets of culpable resistance to the aspirations of black candidacies. Yet that is *precisely* what the district court's holding says about these North Carolina districts.

As shown by the numerous successful black candidacies in these districts and elsewhere throughout the nation, the foregoing levels of white voter support are more than sufficient to give black candidates effective access to the political system.

For example, in *Terrazas v. Clements*, *supra*, 581 F.Supp. at 1352, the minority (Hispanic) candidate for mayor received 90% of the hispanic vote as compared to only 35% of the white vote. When the plaintiff's "expert" opined that this constituted significantly polarized voting for VRA purposes, the court flatly rejected his opinion. The court took the sounder view that polarized voting is only meaningful in the legal sense when it deprives the minority of equal opportunity to participate in the political process. Stressing that the Hispanics could form coalitions to gain greater political access than their raw numbers alone would give them, *id.* at 1354, the court ruled that the 90/35 variance in Hispanic/anglo voting did not constitute a legally significant degree of polarization. In sharp contrast, the court in this case considered even a 79/50 black/white variance to be a significant degree of polarization. (J.S. App. 38a-41a). *See also Collins v. City of Norfolk*, *supra*, 605 F.Supp. at 388-89 (rejecting claims of polarized voting where levels of white support for black candidates were decidedly lower than in this case).

To hold that state election districts violate the VRA merely because a majority of their white voters do not succumb to judicial pressures and submissively vote for black candidates is not merely an unlawful distortion of the VRA. When a court coerces voters to surrender



their freedom of choice in order to appease the court's threats to condemn their election system[9], it violates the First Amendment-based guarantee of absolute freedom to vote as one chooses. *Kirksey v. City of Jackson*, *supra*, 633 F.2d at 662; *Anderson v. Martin*, *supra*, 375 U.S. at 402.

Under the district court's approach to polarized voting, there would be few, if any, districts in the whole United States which could pass muster under Section 2.

Consistent with the liberal view of the Senate Committee Report, the district court proceeded as though a finding of polarized voting plus one other of the "nine factors" would be enough to sustain a finding that Section 2 had been violated. J.S. App. 14a-15a and n. 13. Given that the nine factors are hopelessly broad and amorphous—e.g., "any history of official discrimination" (Factor 1)—*any* locale can easily be found guilty of at least several of them. And few American jurisdictions would not also be "guilty" of polarized voting under the district court's standards. The 1984 Democratic Presidential Primary results (not to mention the 1984 Presidential election itself) conclusively demonstrate that extreme polarized voting is manifest throughout the United States. *See* Appendix A.

Thus, the approach taken by the district court in this case simply proves too much. Congress cannot have intended to enact a standard for Section 2 compliance which can only be met with certainty by homogenous jurisdictions that do not have to cope with the political tensions of racial diversity. The district court's interpretation of the VRA would condemn the election sys-

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[9] In fact, the court's own opinion shows that this phenomenon may have already occurred in North Carolina. J.S. App. 37A n.27. The notable success of black candidates in the 1982 election was ascribed to white support which was reputedly based on fear that the defeat of black candidates would adversely affect the VRA litigation.

tems of *any* jurisdiction where, for instance, conservative non-minority voters "refuse" to vote for liberal or radical candidates who happen to be black; and where candidates have the audacity to urge reduced welfare spending or to oppose forced busing (which the court would undoubtedly condemn as "overt or subtle racial appeals" under Factor 6 of the Senate Report, J.S. App. 13a).

The approach adopted by the court below does not advance valid and lawful principles of voting rights for minorities; instead, it prescribes a form of judicial tyranny over the political and voting freedoms of members of the racial or ethnic majority. This Court should emphatically and unambiguously reject the district court's decision as a profound distortion of the Voting Rights Act and an affront to the Constitution.

## CONCLUSION

For all the foregoing reasons, the decision of the district court should be reversed.

Respectfully submitted,

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## APPENDIX A

Table 4. 1984 Democratic presidential primary voting by race.

| | | | Blacks | | | | | Whites | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|
| State | Date | Black percentage of sample | Glenn | Hart | Jackson | Mondale | White percentage of sample | Glenn | Hart | Jackson | Mondale |
| Alabama | 3/13 | 40% | 1% | 1% | 50% | 47% | 56% | 32% | 37% | 1% | 29% |
| Georgia | 3/13 | 28 | 1 | 5 | 61 | 30 | 69 | 25 | 38 | 1 | 32 |
| Illinois | 3/20 | 25 | — | 4 | 79 | 17 | 69 | — | 45 | 4 | 47 |
| New York | 4/3 | 23 | — | 3 | 87 | 8 | 70 | — | 36 | 6 | 57 |
| Pennsylvania | 4/10 | 16 | — | 3 | 77 | 18 | 82 | — | 43 | 4 | 50 |
| Tennessee | 5/1 | 26 | — | 2 | 76 | 22 | 71 | — | 43 | 2 | 51 |
| Texas * | 5/5 | 33 | — | 1 | 83 | 16 | 56 | — | 37 | 4 | 50 |
| Indiana | 5/8 | 14 | — | 9 | 71 | 20 | 85 | — | 51 | 3 | 44 |
| Maryland | 5/8 | 24 | — | 2 | 83 | 13 | 73 | — | 35 | 5 | 53 |
| No. Carolina | 5/8 | 27 | — | 1 | 84 | 13 | 69 | — | 41 | 3 | 46 |
| Ohio | 5/8 | 19 | — | 3 | 81 | 15 | 79 | — | 50 | 5 | 44 |
| California | 6/5 | | — | 5 | 78 | 16 | | — | 48 | 9 | 40 |
| New Jersey | 6/5 | | — | 2 | 86 | 11 | | — | 38 | 4 | 56 |

Source: CBS/*New York Times* exit surveys.

* Sample of caucus participants